Supreme Court, U.S.
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No. 97-1534

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

HARRY L. HUNT,

Petitioner,

v.

TRUST ADMINISTRATIVE COMMITTEE OF THE EASTERN AIR LINES VARIABLE BENEFIT RETIREMENT PLAN FOR PILOTS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is reported as *Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888 (11th Cir. 1997). The opinion of the district court is unreported.

STATEMENT OF THE CASE

On January 18, 1991, the Trust Administrative Committee of the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "TAC") and the Eastern Air Lines Variable Benefit Retirement Plan for Pilots (the "Plan") were faced with a crisis. Eastern Air Lines, Inc. ("Eastern"), the employer, had ceased making cash contributions to the Plan as a result of its 1989 bankruptcy filing, leaving investment return as the only source of cash. Pet. App. 13a. During the same time period, pilots had been retiring at a rapidly increasing rate and virtually all of them elected to receive lump sum payments. *Id.* And a substantial portion of the Plan's assets were invested in real estate, which was depressed in value due to a nationwide real estate recession. *Id.* In combination, these factors had caused the Plan to become substantially illiquid.[1/]

The Plan is a defined contribution plan created pursuant to a collective bargaining agreement between Eastern and the Airline Pilots Association ("ALPA"), the union representing Eastern's pilots. Pet. App. 6a. In a somewhat unusual arrangement, the Plan has two fiduciaries responsible for different aspects of its administration. Eastern is designated as the "plan administrator," the entity with the powers necessary to carry out the day-to-day operations of the Plan. Pet. App.

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[1]The trial court specifically found that the Plan's illiquidity was not the result of mismanagement by the TAC. Pet. App. 80a. That finding was not disturbed on appeal.

7a. The TAC is the Plan's "named fiduciary," and is responsible for monitoring the management of the Plan's assets. Pet. App. 8a.[2] The Plan's assets are held in trust by a third fiduciary, State Street Bank and Trust Company, pursuant to a trust agreement between the Bank and the TAC. Pet. App. 7a n.7.

Eastern ceased operations on January 18, 1991, and approximately 2,500 pilots became eligible for retirement and lump sum benefits. Pet. App. 13a. The Plan could not meet such a demand for lump sum benefits without conducting a "fire sale" of its illiquid real estate assets. Pet App. 52a. Because the Plan was a defined contribution plan, with benefits based solely on the value of the assets in a participant's account, Pet. App. 6a, such a fire sale would have had been adverse to the interests of all beneficiaries. Pet. App. 52a.

Consequently, the TAC, with the duty to "maintain surveillance over the status and administration of" the Plan and its assets, imposed a moratorium on payment of lump sum retirement benefits effective as of the close of business on January 18, 1991. Pet. App. 14a. Two members of the TAC, former President Ford and former Citicorp president Spencer, testified that the illiquidity of the Plan assets, contrasted with the need for cash presented by as many as 2,500 pilots

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[2]At the time of the events in question, the TAC was composed of two members appointed by ALPA, together with five members appointed by the existing TAC members with ALPA's approval. The members of the TAC included former President Gerald R. Ford; a former President of Citicorp, William I. Spencer; a former chairman of the Board of Metropolitan Life Insurance Company, George P. Jenkins; and a former dean of the Harvard Business School, Lawrence E. Fouraker. Pet. App. 8a n.9.

demanding lump sum benefits, made the moratorium necessary to protect the Plan's assets for the sake of all beneficiaries. Pet. App. 52a. Eastern, the Plan administrator responsible for actually paying benefits, honored the moratorium. Pet. App. 14a-15a.

Hunt filed an application for benefits after January 18, 1991, and was, accordingly, affected by the moratorium. The parties stipulated that, but for the moratorium, Eastern would have paid Hunt his requested lump sum benefits from the assets of the Plan. Pet. App. 74a.

On February 21, 1992, Hunt filed this action against several parties, including Eastern, but not the TAC or the Plan. Pet. App. 2a. A year later, Hunt filed an amended complaint that added the TAC and the Plan, but deleted Eastern as a party. Pet. App. 3a. Subsequently, Hunt and Eastern filed a stipulation dismissing with prejudice Hunt's claims against Eastern. Pet. App. 30a.

Following a bench trial, the district court entered a final judgment directing that Hunt be paid $352,748.74 from the Plan as a lump sum benefit. The court of appeals reversed.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT REQUIRE RESOLUTION OF ANY ISSUE ON WHICH THE CIRCUITS ARE DIVIDED

Petitioner asserts that there is a conflict among the circuits on the question whether the plan administrator is a necessary party in a lawsuit to recover benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. As petitioner acknowledges, however, this issue

was not raised before either the district court or the court of appeals. *See* Pet. at 11. Rather, the court of appeals raised it *sua sponte*, and decided it without the benefit of briefs from the parties. For this reason alone — because the issue was never properly framed — it does not warrant the Court's review.

Equally important, this issue involves an alternate holding, unnecessary to the result. The court of appeals stated that "an in personam order enjoining the payment of benefits under [ERISA] must be directed to a person or entity other than the plan itself." Pet. App. 41a. Citing the decisions of two other circuits, Judge Cox disagreed with this proposition. Pet. App. 59a-60a. Nevertheless, he stated, "I join the remainder of the court's opinion, and, because the holding from which I dissent is an alternative holding, I concur in the result reached by the court." Pet App. 59a. Thus, petitioner would not be entitled to the relief he seeks even if the Court agrees with him that the plan administrator is not a necessary party in an action for benefits under ERISA.[3]

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[3]The decisions cited by petitioner and Judge Cox are, in any event, inapposite. In *Lee v. Burkhart*, 991 F.2d 1004 (2d Cir. 1993), the court held only that the plan administrator was not liable for the payment of benefits from a self-funded welfare plan that was no longer being funded by the employer. And in *Gelardi v. Pertec Computer Corp.*, 761 F.2d 1323 (9th Cir. 1985), the court held that the plan administrator was not subject to a claim for breach of fiduciary duty, because it performed no discretionary functions and was therefore not a fiduciary. Neither case involved a claim for benefits asserted against a plan, and thus, neither court had occasion to consider whether the plan administrator was a necessary party to an order to pay benefits from the plan.

The ruling on which all three members of the panel agreed — that the TAC's decision to impose a moratorium on lump sum benefits was neither arbitrary nor capricious — is unrelated to the question on which the circuit courts are allegedly in conflict. On the contrary, the court of appeals' ruling is fully consistent with well-settled principles of law. The court properly stated the rule that "'a denial of benefits challenged under [29 U.S.C. § 1132(a)(1)(B)] is to be reviewed under a de novo standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility or to construe the terms of the plan.*" Pet. App. 50a (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (emphasis added). The court went on to note that "[t]he arbitrary and capricious standard is the appropriate standard of review in this case because the Plan contains express language conferring discretionary authority upon the administrator to construe its terms." Pet. App. 51a. Applying this standard, the court of appeals held that the TAC acted appropriately. *Id.* at 51a-54a. Plenary review is plainly not warranted to determine whether the court of appeals properly applied the arbitrary and capricious standard to the particular facts of this case.[4]

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[4]Contrary to petitioner's assertion, *see* Pet. at 8-12, the court of appeals did not review the district court's factual findings de novo. Rather, the court of appeals held that the district court erred as a matter of law in failing to apply a deferential standard of review to the actions of the TAC. Pet. App. 53a-54a.

II. THIS CASE PRESENTS AN ISSUE THAT IS NOT LIKELY TO RECUR

Petitioner asserts that the decision below "cripples the enforcement provision of ERISA." Pet. at 13. However, the parties' substantive rights under ERISA are the same regardless of whether the nominal defendant is the plan administrator or the plan itself. If a pension plan participant brings an action solely against the plan, the court will rarely if ever dismiss an action on that technical ground alone, without permitting the participant to amend his complaint to name the plan administrator as a defendant. *See* Fed. R. Civ. P. 15(a) (leave to amend pleadings "shall be freely given when justice so requires").

This case, however, was complicated by petitioner's highly unusual procedural maneuvers. First, petitioner filed suit in the district court against Eastern and a number of other parties. Then, over petitioner's objection, the bankruptcy court overseeing Eastern's liquidation approved an amendment to the Plan that adversely affected petitioner's position in the district court litigation. "[I]n an obvious attempt to avoid the effect of the bankruptcy court's [ruling]," Pet. App. 48a, petitioner dismissed his action against Eastern (the Plan administrator) and filed an amended complaint naming the TAC and the Plan as defendants. The awkward procedural posture of this case, which is unlikely to be repeated in the future, makes it extremely unlikely that a decision by the Court would affect anyone other than the parties to this case itself.

III. THE DECISION BELOW IS FULLY CONSISTENT WITH THE PURPOSES OF ERISA

Contrary to petitioner's contention, the decision below does not depart from Congress's intent in enacting ERISA. To

be sure, Congress enacted ERISA to protect the interests of pension plan participants such as petitioner. Under ERISA, however, the TAC had a fiduciary duty to *all* of the Plan's participants — not just to petitioner.

ERISA provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Although the TAC considered the alternative of a sale of real estate to solve the Plan's liquidity problem, President Ford testified that the TAC "would have been very imprudent . . . to have sold that real estate in that particular crisis. It was far wiser, much more prudent, to hold those assets until the real estate market in those areas improved." R5-125-25-26. And indeed, the real estate market has improved substantially since the moratorium was imposed in 1991. R5-125-36, 55. Under these circumstances, the TAC would have been vulnerable to an action for breach of fiduciary duty had it *not* imposed the moratorium to protect the interests of all the participants in the Plan.

Moreover, the dispute in this case concerns only the *form* of benefit that petitioner is entitled to receive from the Plan. Former Eastern pilots such as petitioner are entitled to receive their benefits under the Plan, but over a period of time, as the Plan's real estate holdings and other assets are liquidated in an orderly manner. Distribution of the Plan's assets in this manner ensures that all of the participants will receive the balance in their individual accounts, with no unnecessary diminution in value. The TAC's action is, accordingly, fully consistent with ERISA's purpose of protecting all of a pension plan's participants.

IV. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CONFLICT BETWEEN TWO DECISIONS OF THE SAME COURT OF APPEALS

The Court does not ordinarily grant certiorari to review *intra*circuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Thus, petitioner misses the mark with his assertion that plenary review is necessary to resolve a conflict between the decision below and the decision of the Eleventh Circuit Court of Appeals in *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983). In any event, the decision below does not conflict with *Fine*. In that case, the court held that once a participant has "met his initial burden of offering evidence of facially inconsistent treatment" of similarly situated participants, the burden shifts to the plan trustees to justify their actions. *Id.* at 1095. Unlike the plaintiff in *Fine*, petitioner received the same treatment as similarly situated participants. The moratorium on lump sum benefits applied to all participants, including Hunt, who submitted applications after the close of business on January 18, 1991. Indeed, as the Eleventh Circuit noted, "[i]f the Plan administrator were to grant Hunt's lump-sum benefit application, . . . it would be arbitrarily favoring Hunt over all of the other pilots who, like Hunt, did not submit their application before the imposition of the moratorium." Pet. App. 53a. Thus, the Eleventh Circuit's decision in *Fine* is inapposite.

Moreover, contrary to Hunt's contentions, nothing in *Fine* suggests that the burden of proof ever shifts in an action for benefits under ERISA. Instead, *Fine* stands for the unremarkable proposition that, once a plaintiff states a prima facie case, the burden of going forward shifts to the defendant. The district court in this case failed to recognize that fact. The district court further failed to recognize that the TAC's only obligation, even assuming that Hunt had established a prima facie case, was to present evidence demonstrating that its

decision was neither arbitrary nor capricious. For this reason, the court of appeals correctly concluded that the district court erred as a matter of law. *See* n.4, *supra*.

V. THE COURT OF APPEALS DID NOT BASE ITS DECISION ON THE COMMON LAW OF TRUSTS

In Question 3, petitioner requests that the Court review this case to decide whether pension plan fiduciaries should have "an unrestricted cloak of protection under the 'common law of trusts.'" Pet. at i. The decision of the court of appeals, however, was not based on the common law of trusts. On the contrary, the court of appeals specifically stated:

> [T]he district court assumed that the common law of trusts gave the TAC the power to impose the moratorium. We need not make this assumption . . . , however, because . . . the Plan [itself provides] the authority to impose a moratorium.

Pet. App. 50a n.64. Thus, Question 3 is not properly before the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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